United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7232

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of :

JAMES ANTHONY & CO., INC., :

Bankrupt, :

Docket No. 75-7232

WEIL, GOTSHAL & MANGES, ESQS., :

Appellant. :

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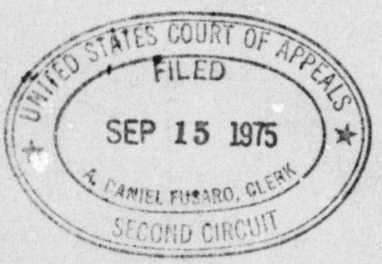

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Preliminary Statement and Issue Presented

Weil, Gotshal & Manges performed extensive legal services for the Chapter XI Receiver of James Anthony & Co., Inc., and now appeals from an order of District Judge Charles M. Metzner, dated March 3, 1975, which arbitrarily reduced by 45% the firm's final compensation for work the bankruptcy judge found to have been "of extremely high quality." (107-108a)*

The issue thus presented is:

> "With the bankruptcy judge's findings to the contrary, did the district judge properly reduce an allowance of attorneys' fees by $5,000 when the recovery of a $1,000,000 estate and the quality of the services justified full compensation for $11,042.50 in actual time charges?"

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* References are to pages in the Appendix.

Appellant respectfully submits that the action of the District Court was improper and that the order below should be reversed.

Statement of the Case

A. The Order Appealed From

Appellant Weil, Gotshal & Manges ("Weil, Gotshal") appeals from the order of District Judge Charles M. Metzner, dated March 3, 1975, ("the March 3 order") (146a) approving the Amended Certificate of Bankruptcy Judge John J. Galgay, dated February 26, 1975, (the "Amended Certificate") (140a) which recommended interim and final allowances of compensation for professional services rendered to the estate of James Anthony & Co., Inc., ("the Bankrupt").

B. The Dramatis Personae and the Proceedings Involving James Anthony & Co., Inc.

Weil, Gotshal and its predecessor, Seligson & Morris, performed legal services for the benefit of the Bankrupt under several official titles. The firm's designation kept changing as the Bankrupt moved, successively, from an equity receivership proceeding to a Chapter XI proceeding and finally into bankruptcy liquidation.

The case began in 1969 when the Securities and Exchange Commission brought an action against the Bankrupt for appointment of an equity receiver. (96a) The equity receivership continued until June 20, 1969, when the Bankrupt filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. (96a) On July 3, 1969, John T. Collins, who served as Equity Receiver, was appointed as the Chapter XI Receiver. (99a) (Hereafter, "Receiver" refers to both the Equity Receiver and Chapter XI Receiver.)

Finally, James Anthony & Co., Inc., was adjudicated a bankrupt on February 2, 1970, and a trustee in bankruptcy was appointed. (99a)

Meanwhile, the law firm Seligson & Morris had been appointed special counsel to the Equity Receiver (17a; 105a) while the firm Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") represented the Equity Receiver, generally (7a). When the proceedings moved into Chapter XI, Seligson & Morris, because of its special expertise in insolvency proceedings, became general counsel to the Chapter XI Receiver pursuant to an order of the bankruptcy court dated July 15, 1969. (105a)

Effective December 1, 1969, Seligson & Morris was dissolved, but the attorneys with that firm who practiced

extensively before the bankruptcy court and who represented the Equity Receiver and the Chapter XI Receiver became members of or associated with Appellant, Weil, Gotshal. In the change-over from Seligson & Morris to Weil, Gotshal the same three lawyers continued doing all of the work for the Chapter XI Receiver. According to Judge Galgay's findings, there is no useful purpose in distinguishing between Seligson & Morris and Weil, Gotshal. (109a)

Weil, Gotshal continued to be extensively involved with the Bankrupt until a few weeks after the trustee in bankruptcy was appointed. In the period of little more than a year, the team consisting of Weil, Gotshal, the Receiver, and Paul, Weiss (general counsel to the Equity Receiver and special counsel to the Chapter XI Receiver), succeeded in amassing a distributable estate with a value of approximately $1,000,000. (108a)

C. The Services Rendered by Weil, Gotshal & Manges

Beginning with virtually no estate, Paul, Weiss and Weil, Gotshal were instrumental in turning over more than $1,000,000 to the bankruptcy trustee. (108a) In achieving successful results, Weil, Gotshal's services fell into two major categories.

The first involved a massive investigation into the circumstances surrounding the Bankrupt's financial failure and a coordination of the Receiver's own investigation with those of Appellant and the Receiver's accountants. Included in this investigation were extended examinations of the family of the Bankrupt's principal. Weil, Gotshal's investigation uncovered the location of a significant amount of assets, which the firm endeavored, with a good measure of success, to recover. (51a-53a; 58a-59a; 133a-135a)* These investigations were still ongoing at the time of the Bankrupt's adjudication.

The second category of services rendered by Weil, Gotshal to the Chapter XI Receiver involved the liquidation and collection of the Bankrupt's accounts receivable and choses-in-action. By these efforts the Chapter XI Receiver was able to collect more than $50,000 in accounts receivable due from other broker dealers, approximately $130,000 from Franklin National Bank, $1,000 in dividends, and some $13,000 in miscellaneous accounts receivable. (53a-56a; 58a; 136a)

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* Seligson & Morris and Appellant were significantly aided in these efforts by Paul, Weiss, special counsel to the Chapter XI Receiver. Specifically, the Paul, Weiss firm's services centered on the tax aspects of the proceedings (102a-105a).

All told, the investigation and liquidation of the Bankrupt's assets meant recovering approximately $600,000 in cash and an inventory of securities having a value of approximately $370,000. (97a; 41a; 14a)

Conversion of the Chapter XI case to straight bankruptcy added measurably to Weil, Gotshal's labors. After adjudication, the firm was required to marshall its entire set of files and turn them over to the bankruptcy trustee and his new counsel. To make the changeover as smooth as possible, Weil, Gotshal undertook to familiarize the trustee's attorneys with the ongoing investigation. In addition, the firm prepared a highly detailed 19 page report for the trustee's use. (9a-10a)

Finally, Weil, Gotshal assisted the Chapter XI Receiver in preparing his final report, accounting, and application for allowance. (10a-11a) This 27 page report, like the case as a whole, was complicated by the two receiverships in the space of one year.

D. The Application for Allowance

It was not until January, 1974, nearly five years after the case began, that the time came for preparing an application for allowance. In the intervening years, Weil,

Gotshal had not received any interim compensation for its services or reimbursement for its out-of-pocket expenses.

Bankruptcy Judge John J. Galgay held a hearing on June 4, 1974, to consider the applications for allowance. (97a) The hearing was held upon notice to all creditors and parties in interest, but no one objected to the applications then or at any later time.

In its application, Weil, Gotshal requested an allowance of final compensation in the sum of $11,000, together with reimbursement of $338.21 in disbursements. (13a-16a) Weil, Gotshal's application reflected that the firm had spent a total of 184 hours. (109a; 12a-13a) Besides breaking down in detail the time spent by each attorney and his hourly billing rate, the application offered to turn over the actual time record slips for the court's inspection. (12a) Overall, the average hourly billing rate for all lawyers on the case was less than $60 per hour, and the associate who performed most of the work became a partner at Weil, Gotshal long before the 1974 hearings. (130a-133a; 137a-139a)

At the June 4, 1974 hearing, Arthur Liman, Esq., a member of the Paul, Weiss firm, and Jerry B. Klein, C.P.A., a member of the Receiver's accounting firm, both attested to

the difficulty of tasks performed by Weil, Gotshal. (73a-80a; 88a-95a)

In particular, Mr. Liman, after stating his experience in the securities fraud unit in the United States Attorney's Office, testified,

> "I think that this broker-dealer was in the worst shape that I had ever seen and that I could ever imagine." (74a-75a) See also, 3a-4a (the Bankrupt's books and records described as "sheer chaos").

As Judge Galgay found from the uncontroverted testimony at the June 4 hearing, the Receiver, Weil, Gotshal and Paul, Weiss together recovered over $1 million from the chaos that previously existed in the back offices of James Anthony & Co., Inc.* (108a) Even now, four years after the close of the Chapter XI receivership, the same $1 million is, for the most part, the entire bankrupt estate. The testimony of both the attorney for the bankruptcy trustee, and the trustee's accountant fails to reveal that any substantial sums were recovered during the pendency of the bankruptcy case itself. (60a-73a; 81a-88a)

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* Mr. Klein, a partner of the firm which served as accountants to the Chapter XI Receiver, testified that it was his opinion that the success in assembling such a large estate was largely due to the efforts of Appellant, and particularly to the services rendered by one of its partners, Alan B. Miller. (94a)

E. The Bankruptcy Judge's Certificate Authorizing Allowances

On December 4, 1974, five years after Weil, Gotshal's retention (97a; 109a), Bankruptcy Judge Galgay rendered his original Certificate pursuant to Rule 16(c) of the Bankruptcy Rules of the United States District Courts for the Southern and Eastern Districts of New York ("original Certificate"). (96a) Judge Galgay's original Certificate recommended the following compensation for services rendered on behalf of the Bankrupt's estate:

Name of Applicant	Compensation Requested	Compensation Recommended
Weil, Gotshal & Manges, Attorneys for Chapter XI Receiver (final compensation)	$11,000.00	$11,042.50
Paul, Weiss, Rifkind Wharton & Garrison Attorneys for the Equity Receiver and Special Counsel to the Chapter XI Receiver (final compensation)	$36,984.00	$36,984.00
Seligson & Morris, Attorneys for Chapter XI Receiver and Special Counsel to Equity Receiver (final compensation)	$33,421.25	$33,421.25

John T. Collins, as Equity Receiver and Chapter XI Receiver (final compensation)	$29,301.07	$29,301.07
Irving Schneider, Attorney for Bankrupt (final compensation)	$10,000.00	$ 7,000.00
Alex L. Rosen, Special Counsel for Trustee in Bankruptcy (interim compensation)	$125,000.00	$70,000.00
Neil Moritt, General Counsel to Trustee in Bankruptcy (interim compensation)	$125,000.00	$70,000.00

(96a-118a)

In his original Certificate, Bankruptcy Judge Galgay made a number of important findings of fact. At one point, the Bankruptcy Judge commented upon the "tremendous amount of professional services [that] have been rendered both to the Equity Receiver, the Chapter XI debtor-in-possession and the bankrupt." (97a) Bankruptcy Judge Galgay also discussed the state of affairs at the time the District Court first appointed the Equity Receiver:

> "Based on affidavits attached to the various applications and from the testimony taken by me on the June 4th hearing on such applications, it is clear that the James Anthony Co., Inc., in the course of conducting its brokerage operations suffered

> from the same back office problems that most leading brokerage houses did at or about that time. That problem was compounded by the horrendous manner in which the Anthony Company kept its ordinary books and records, their manner in which it recorded checks, handled securities, dealt with dividend checks, orders from customers and the records of customers showing how much owed by them, how much due them and what security belonged to the various individual and brokerage customers.
>
> "The testimony before me by the lawyers and accountants, relating their first encounter with the records of the Anthony Company describe the scene as if the brokerage house records had been in a wind tunnel, strewn all over in a helter skelter fashion. Obviously, the amount of work necessary to just get records in order before any meaningful proceedings could get underway was simply enormous. The operation of this company was so reckless, that a grand jury investigation was commenced to look into very serious charges which grew out of the initial complaint of the Securities & Exchange Commission and other information that was uncovered with respect to the Masiello family which owned and operated the James Anthony & Co., Inc." (98a-99a) [emphasis supplied].

The certificate also described in considerable detail the services rendered by Seligson & Morris and Weil, Gotshal. In characterizing those services, Bankruptcy Judge Galgay commented as follows:

"The application recites in detail the many and varied activities which [Seligson & Morris] performed on behalf of the Chapter XI Receiver, all of which were necessary and skillfully performed... An inventory of all cash, certificates of deposit, stock certificates, furniture and fixtures and equipment was made. The applicant prepared the appropriate papers for the sale of personal property that was no longer needed and also advised the accountant of the Receiver as to the proper establishment of the inventory of stock certificates in the Receiver's possession. Much time was spent on this task and its successful conclusion was of considerable value of the estate....

"The applicant also conferred and advised Paul, Weiss, Rifkind, Wharton & Garrison, Special Counsel to the Receiver, handling all aspects of Internal Revenue Service claims and other tax problems.

"A considerable amount of professional time and effort was involved in the investigation into the facts and circumstances surrounding the bankrupt's financial failure; at the time it was necessary to coordinate that investigation with an investigation being conducted by the Receiver's accountants. This phase included the examination of fifteen designated persons and centered on the Masiello family. The application treats in considerable detail the nature of the investigation and its success in discovering assets and the basis for further action against such individuals. The investigative phase of the duties of the applicant as counsel to the Receiver was extraordinarily difficult and consumed a tremendous amount of time. The Chapter XI proceedings terminated before

the investigation was fully completed; however, the valuable contribution was made by the investigation and all evidence obtained thereby was turned over to the counsel for the Trustee in Bankruptcy. In addition to securities which were turned over to the Trustee in Bankruptcy having a value of $376,000, almost $600,000 in cash was also turned over. Thus, as a result of the efforts of the Receiver and the Equity Receiver and the applicant, almost $1 million dollars was transferred to the Trustee in Bankruptcy.

* * *

"The professional services performed were of extremely high quality and results obtained would fortify that view". (107a-108a) [emphasis supplied].

In connection with Weil, Gotshal's application for final allowances, Bankruptcy Judge Galgay commented,

"The previsou [sic] application of Seligson & Morris dealt with services up to December 1, 1970.* The same attorneys who performed the services under that application joined the firm of Weil, Gotshal & Manges just prior to December 1, 1970*, and continued to perform the services described in the previous application. Between December 1, 1969 and the present time the applicant claims to have expended an additional 184 hours in professional services all of which was [sic] necessary and actually rendered to the Receiver in accordance with his instructions and request. Again, the majority of time spent was billed at the rate between $55 and $65 an hour. An

* The 1970 dates are in error. It should be "December 1, 1969."

> examination of this application and the Seligson & Morris application offers sufficient support for the allowances sought. I recommend payment in the amount of $11,042.50." (109a)

No creditor objected to the recommendation by Bankruptcy Judge Galgay when his original Certificate came on for hearing before the District Court on December 10, 1974. Nonetheless, District Judge Metzner, without opinion, remanded the matter to the Bankruptcy Judge to consider, inter alia, whether there was any duplication in the work done by Paul, Weiss and Weil, Gotshal. (119a-123a; 141a-142a)

Pursuant to the remand, a further hearing was held before Judge Galgay on January 28, 1975, "relevant to the issue as to the reasonableness of the compensation sought and the recommendations to be made." (140a; 120a) The Bankruptcy Court received further testimony and thereafter rendered an Amended Certificate pursuant to local Bankruptcy Rule 16(c), dated February 26, 1975. (140a) ("Amended Certificate")

The Amended Certificate itself contains no findings of fact relevant to anyone other than the Equity Receiver's accountants. Instead of making new findings, Bankruptcy Judge Galgay incorporated his original Certificate

by reference. (142a) Thus, all the Judge's laudatory findings of fact about Weil, Gotshal remained in their original, unblemished form. Nevertheless, the Amended Certificate went on, without explanation, to recommend cutting Weil, Gotshal's compensation from $11,000 to $6,000. (143a) Bankruptcy Judge Galgay's new recommendations, compared to the original Certificate, are:

Name of Applicant	Amount Recommended in Original Certificate	Amount Recommended in Amended Certificate
Weil, Gotshal & Manges Attorneys for Chapter XI Receiver	$11,042.50	$ 6,000.00
Paul, Weiss, Rifkind, Wharton & Garrison, Attorneys for the Equity Receiver and Special Counsel to the Chapter XI Receiver	$36,984.00	$30,000.00
Seligson & Morris, Attorneys for the Chapter XI Receiver and Special Counsel to Equity Receiver	$33,421.25	$30,000.00
John T. Collins, as Equity Receiver and Chapter XI Receiver	$29,301.07	$20,000.00
Irving Schneider, Attorney for Bankrupt	$ 7,000.00	$ 6,000.00

Alex L. Rosen, Special Counsel for Trustee in Bankruptcy	$70,000.00	$45,000.00
Neil Moritt General Counsel to Trustee in Bankruptcy	$70,000.00	$40,000.00

(142a-144a)

F. The Order Appealed From

The Amended Certificate was not placed upon the Miscellaneous Motion Calendar of the District Court and no notice of hearing was given to anyone. (157a) On March 3, 1975, the same day that Weil, Gotshal received a copy of the Amended Certificate in the mail, the District Court summarily entered an order approving the allowances recommended in the Amended Certificate and reducing the firm's fees from $11,042.50 to $6,000. (146a-147a; 159a) After a motion for rehearing in the District Court was denied (163a), Weil, Gotshal filed its appeal from the March 3 order.* (164a)

The March 3 order revealed that District Judge Metzner had requested that the Bankruptcy Judge "review the application with a view to ascertaining duplication of effort, if any, and the scale of fees as of the date the services were rendered, not as of the date of the application." (147a) [Emphasis supplied.] The court also noted

* Appellant used the procedural device of a motion for reconsideration in order to obtain a hearing before the District Court on the issue of its compensation, but none was ever held.

what appears to be the underlying reason for the unexplained slash in compensation:

> "The total of the original requests amounted to about $430,000. The original recommendation for allowances totalled about $335,000. The amended recommended allowances amount to about $250,000." (147a)

Before examining whether the March 3 order is supportable as a matter of law, it should be evident that there is no factual basis in the record for reducing Weil, Gotshal's attorneys' fees under the standards established by District Judge Metzner himself. For example, Bankruptcy Judge Galgay did not find that Weil, Gotshal's services were duplicated by any other law firm, receiver, or trustee. See 124a-128a; 133a-137a. Further, it is clear from Weil, Gotshal's fee application that the $11,000 requested was based upon the firm's usual, hourly fee schedule in effect at the time the services were performed. The court determined that most of the work was done by attorneys whose billing rate was less than $60 per hour. (109a; 12a-13a)

Most important, there is neither a single shred of evidence nor a solitary finding of fact in any way justifying a 45% fee reduction. To the contrary, the only relevant findings of fact to be found anywhere in the record on

appeal are those contained in Bankruptcy Judge Galgay's original Certificate where he found that the professional services of Weil, Gotshal's lawyers "were of extremely high quality".(108a)

There was no opinion explaining why Weil, Gotshal's fees were deemed to be excessive as a matter of law. Even if the aggregate compensation sought by all applicants was out of line, Appellant respectfully submits that it was incumbent upon the court to examine each firm's fees separately. To lump all applicants together and to slash the fees of everyone alike is, we believe, both inequitable and contrary to the standards which have long been erected for fixing counsel fees in bankruptcy cases. As a matter of plain economics, the five years that Weil, Gotshal has waited for any compensation means, even if one assumes there has been an aggregate inflation of only 35%, that the real value of the $6,000 in fees amounts to no more than $24 per hour, an amount incredibly low for services of "extremely high quality" which benefited the bankrupt estate by hundreds of thousands of dollars.

ARGUMENT

I

THE ONLY AMOUNT OF COMPENSATION SUPPORTED BY THE RECORD AND FINDINGS OF FACT IS THAT INITIALLY RECOMMENDED BY BANKRUPTCY JUDGE GALGAY

Section 64a of the Bankruptcy Act (the "Act"), 11 U.S.C. §104, provides that "the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition" are debts to be accorded priority. In turn, Rule 219 of the Rules of Bankruptcy Procedure lists the considerations to be employed in fixing compensation for professional services.

> "(c) Factors in Allowing Compensation. (1) General. The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors." [Emphasis supplied.]

The Advisory Committee's Note to Rule 219 explains that,

> "The premise for including in these rules provisions governing the allowance of compensation to officers, attorneys, and accountants is that it is peculiarly a judicial responsibility to supervise the administration of estates and in particular to assure that allowances for compensation to those rendering services in connection herewith are fair but not excessive."

As far as procedure is concerned, Rule 16(b)(i) of the Bankruptcy Rules of the United States District Court for the Southern and Eastern Districts of New York provides that

> "[t]he referee shall also make recommendations to the [district] court as to compensation and the amount thereof, in accordance with these rules and the Bankruptcy Act, to receivers, trustees,...attorneys for bankrupts, attorneys for receivers and attorneys for trustees."

Applying these rules first to the question of quantum, courts impose a test of reasonableness. E.g., Bankruptcy Rule 219; Jacobowitz v. Double Seven Corporation, 378 F. 2d 405, 408 (9th Cir. 1967); In re Charles Ray Glass, Inc., 47 F. Supp. 428 (S.D. Cal. 1942). In turn, "reasonableness", is "the area where the fees are neither so high as to startle the judgment nor so low as to be unmindful of the dignity of the profession and forgetful of the important duty of counsel." Herzog, Fees and Allowances in Bankruptcy

30 Conn. B.J. 374, 377 (1962) ("Herzog"). And, of course, fixing a reasonable fee is left to "the sound discretion of the court." In re Lustron Corp., 196 F. 2d 975, 979 (7th Cir. 1952); Commerce Trust Co. v. Aylward, 145 F. 2d 113 (8th Cir. 1944); Milbank, Tweed & Hope v. McCue, 111 F. 2d 100 (4th Cir. 1940); and In re Owl Drug Co., 16 F. Supp. 139 (D. Nev. 1936), aff'd sub nom. Cohn v. Edler, 90 F. 2d 823 (9th Cir. 1937). The findings of the bankruptcy judge are to be given great weight and should not be disturbed unless they are clearly erroneous, reflect a mistake of law, or result in injustice. In re Howat, 278 F. 2d 582, 583 (7th Cir.), cert. denied, 364 U.S. 887 (1960); In re Dunnhill Suspender & Belt Corp., 162 F. Supp. 608, 611 (S.D.N.Y. 1958); In re Valentine, 139 F. Supp. 576 (D. Md. 1956).*

Notwithstanding the discretion given to the bankruptcy judge, courts have established criteria for evaluating fee requests.

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* Like Rule 52(a) of the Federal Rules of Civil Procedure, Bankruptcy Rule 810 provides, in pertinent part, that the district "court shall accept the referee's findings of fact unless they are clearly erroneous...." In the context of a fee application in the bankruptcy court, it has been held that "the referee's discretion and judgment, if free from error of law and sufficiently supported by evidence, is entitled to great weight, even though he was not in office when the services were rendered." In re Valentine, 139 F. Supp. 576, 577 (D. Md. 1956).

"The principal factors which enter into a determination of what is reasonable are the time spent, the intricacy of the questions involved, the size of the estate, the opposition encountered, the results obtained and the 'economic spirit' of the Bankruptcy Act to curtail unnecessary expenses." In re Paramount Merrick, Inc., 252 F. 2d 482, 485 (2d Cir. 1958) [emphasis supplied.] See also, Jacobowitz v. Double Seven Corporation, 378 F. 2d 405, 408 (9th Cir. 1967); In re Dunnhill Suspender & Belt Corp., supra; and In re Owl Drug Company, supra.

In addition, other factors are important:

1) the necessity for spending the time claimed (In re Charles Ray Glass, Inc., 47 F. Supp. 428 (S.D. Cal. 1942));

2) the skill demonstrated by counsel (Jacellen Realty Corp., CCH Bankr. Rep. ¶54,378 (D.C.N.Y. 1943); Herzog at 381);

3) whether the attorneys have previously received any interim compensation (In re Long Island Properties, 150 F. 2d 313 (2d Cir. 1945));

4) the adequacy of applicant's time records (In re Wal-Feld Co., 345 F. 2d 676, 677 (2d Cir. 1965); In re Hudson & Manhattan Railroad Co., 339 F. 2d 114, 115 (2d Cir.1964));

5) whether or not any creditor has objected to the subject fee request (In re Brooks & Woodington, Inc., 505 F. 2d 794, 799 (7th Cir. 1974));

6) whether the estate at the outset had no assets or limited assets (In re Midwest Engineering and Equipment Co., 440 F. 2d 326, 329 (7th Cir. 1971); In re Osofsky, 50 F. 2d 925, 927 (S.D.N.Y. 1931); Silver v. Rosenberg, 139 F. 2d 1020, 1021 (2d Cir. 1944));

7) the results achieved ("[G]reat success and benefit to the estate commands a liberal compensation...." 3A Collier, Bankruptcy ¶62.12[5] at 1486 (14th Ed. 1975). Cf. In re General Economics Corporation, 360 F 2d 762, 766 (2d Cir. 1966).), and

8) the complexity of the services performed:

> "Complicated problems and serious opposition must be reflected in the size of the fee. For exacting labor done, weighty responsibilities assumed and great results accomplished, compensation should be dealt out with a more liberal hand than in a routine case involving no litigation and no intricate problems." Herzog at 379 (citing In re Curtis, 100 Fed. 784 (7th Cir. 1900)).

In an exceptional case, such as this, where the estate grew from virtually nothing to more than $1 million, the courts focus on those aspects of the professional services performed which turned the administration into something out of the ordinary. Thus when the applicants have actually augmented the estate, the element of contingency should be taken into consideration.

> "In bankruptcy cases,...there seems to me to be another element which has to be considered. That is the fact that in bankruptcy very often futile quests for assets have to be made. Many times, however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts. It is then a question, as in salvage at sea, of no cure, no pay.
>
> "When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, create it, they should be well rewarded; otherwise there will not be any incentive to attorneys to put forth their best efforts in cases which appear unpromising." In re Osofsky, 50 F. 2d 925, 927 (S.D.N.Y. 1931). See also, Silver v. Rosenberg, 139 F. 2d 1020, 1021 (2d Cir. 1944); Hammer Tuffy, 145 F. 2d 447 (2d Cir. 1944); Herzog at 393-94.

Weil, Gotshal, of course, is seeking nothing more than its actual time charges, even though its efforts,

together with those of the Receiver and Paul, Weiss, are responsible for there being any estate at all to distribute to the other administration, priority and general creditors. Thus, assuming that which was not the case here -- that ultimate compensation was assured from the outset -- the most fundamental factors are the length of time the applicant rendered services to the estate and the hours fairly required to render the necessary services:

> "[W]here a law firm provides a wide range of services for a trustee over a considerable period of time and ultimate payment is virtually assured, 'time required' is a principal method of valuation..." In re Mabson Lumber Co., 394 F. 2d 23, 25, Fn. 5 (2d Cir. 1968) (citing In re Hudson & Manhattan Railroad Co., 339 F. 2d 114 (2d Cir. 1964), and In re Wal-Feld Co., Inc., 345 F. 2d 676 (2d Cir. 1965)).

Unlike Bankruptcy Judge Galgay's original Certificate, the primary shortcoming in the Amended Certificate and the March 3 order is that all applications were treated on the same basis and no effort was made to apply the criteria discussed above to each individual applicant. Focusing on Weil, Gotshal's representation of the estate, one can only infer from the original Certificate that Bankruptcy Judge

Galgay found Appellant spent 184 hours.* This time was minutely documented in computerized time records, which appellant willingly made available to the Bankruptcy Court. (12a) Judge Galgay also found that the questions involved were intricate, the investigatory tasks presented were "extraordinarily difficult", the skill displayed was "of extremely high quality", the result was assembling an estate of approximately $1,000,000, and the amount of time spent was justified.

In light of these uncontradicted findings, we respectfully submit that the court had no alternative but to approve the entire $11,000 sought by Appellent. We also note that the attorneys at Weil, Gotshal were the only lawyers in the Southern District of New York who had ever before represented the trustee of an insolvent brokerage house. (46a-47a) Thus, the amount of fees sought, minimal to begin with, were kept even lower because Weil, Gotshal had the only then existing expertise available to the Receiver.

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* In discussing the time claimed by appellant in its application, Judge Galgay commented, "An examination of this application and the Seligson & Morris application offers sufficient support for the application sought." 109a. See also 12a-13a.

In short, there is neither a single shred of evidence nor one finding of fact anywhere in the record justifying an arbitrary and unexplained 45% cut from $11,000 to $6,000. Therefore, the Amended Certificate and the March 3 order are clearly erroneous insofar as they approve a drastically reduced fee schedule which has no support in the record but is, in fact, in complete contradiction with the court's detailed findings of fact. On the other hand, the original Certificate properly and meticulously applied the standards imposed by the cases discussed above. We respectfully submit that the reduction in compensation to appellant was arbitrary and without any foundation in law or in fact.

II

AN ALLOWANCE, OTHERWISE REASONABLE, MAY NOT BE REDUCED SOLELY ON THE PRINCIPLE OF ECONOMY.

It is apparent from the March 3 order that the court, as a rule of thumb, felt that a total allowance of one third of the estate was excessive but that one quarter was proper. In short, the court applied the principle of economy in reducing everyone's fees. It may have been that there was duplication of services or waste of effort in the

work performed by others, but as to Weil, Gotshal, the record fully supports the court's original conclusion that all 184 hours were necessarily and productively spent. In this context, arbitrarily economizing at Appellant's expense has long been held to be improper. In fact, a court is not justified in reducing an allowance solely on the principle of economy. In re Hamilton Distributors, Inc., 440 F. 2d 1178, 1180 (7th Cir. 1971) ("The 'economical spirit' of the Act does not however require or justify reducing attorney fees where all other factors indicate the fees are reasonable.").

> "Economical considerations are but one of the considerations going into a reasonable fee--to be weighed and valued with others ... Economy is by no means synonymous with parsimony and should not exclude a compensation that is under all the circumstances of the case fair and reasonable. To reserve as much as possible for distribution to the creditors is one postulate, but there is another, perfectly compatible with the former, not to discourage, needlessly, able and competent lawyers from accepting a retainer in Bankruptcy by denying them reasonable remuneration. A misunderstood economy in this respect may lead to evils far greater than the sacrifice imposed on the individual creditor by reason of an equitable allowance for a meritorious and diligent counsel." Brownstein, Awarding Fair Fees In Bankruptcy: Recent Developments, 45 Conn. B. J. 69 (1971). See also,

3A Collier, Bankruptcy ¶62.12[5] at 1483-5; Herzog at 377-378; Silver v. Rosenberg, 139 F. 2d 1020, 1021 (2d Cir. 1944) ("In the end the inducement must be kept great enough to call out the effort, and to cover the risk of failure."); and Snedecor, Fees and Allowances in Straight Bankruptcy, Ref. J. 26, 28 (Jan., 1966).

The Ninth Circuit Court of Appeals, in Jacobowitz v. Double Seven Corporation, 378 F. 2d 405 (9th Cir. 1967), reviewed a situation not unlike the one at bar. The referee's findings of fact fully supported the fee requested by the trustee's attorney. 378 F.2d at 408. Although it is not entirely clear from the Court of Appeals' decision, it may fairly be inferred that the referee made an initial recommendation which the district court found too high. The Court of Appeals was disturbed by the district court's disregard of the thrust of the referee's findings of fact:

> "After reading the referee's findings, which almost completely favor the appellant, it is difficult to conclude otherwise than that the requested fees were reasonable and should have been allowed. Since they were reduced, the district court must have been strongly persuaded by either one or both of two considerations, neither of which we believe to be valid." 378 F. 2d at 408.

The first consideration to which the court referred was reliance on statistical averages of administrative

expenses generally throughout the United States. The court found untenable any such reliance, commenting that "[a]ttorneys' fees, like other expenses of administration, vary widely, depending upon the circumstances and must be considered and determined on a case by case basis." 378 F. 2d at 408. Second, the Jacobowitz court found it "apparent" from "the referee's findings that he believed himself compelled by the economical spirit of the Bankruptcy Act to cut to an appreciable degree every request for attorneys' fees, no matter how low they might appear upon the scale of reasonableness when measured by private employment standards." 378 F 2d at 408. The Court of Appeals held squarely that the district court erred in blindly relying on the rule of thumb that attorneys' fees in bankruptcy cases must be reduced to below the level that similar services would be worth in non-bankruptcy cases, especially when the referee's findings supported a higher award:

> "We think that the economical spirit of the Bankruptcy Act does not require, nor justify, reducing a requested fee where, as here, by all other proper standards it is a fair and reasonable one . . . . Under such circumstances we find the requirement of economy has been met and the reduction is unsupported either by the law or the evidence." 378 F. 2d at 408-09 (emphasis supplied).

In the case at bar, economy is the only conceivable ground for the district court's rejection of the original recommended allowance. Hence, summary rejection of the original Certificate, and the equally summary adoption of an arbitrary and unwarranted 45% reduction, constitutes reversible error.

III

THE COMPENSATION RECOMMENDED IN THE ORIGINAL CERTIFICATE WAS NEITHER UNREASONABLE NOR UNJUSTIFIED EITHER IN ABSOLUTE AMOUNT OR AS A PERCENTAGE OF THE BANKRUPT ESTATE.

Although the compensation recommended for Appellant in Bankruptcy Judge Galgay's original Certificate was fully supported by the uncontroverted facts, the 45% reduction in Appellant's allowance was apparently based on the court's overall notion of an appropriate aggregate amount of allowances:

> "The total of the original requests amounted to about $430,000. The original recommendation for allowances totaled about $335,000. The amended recommended allowances amount to about $250,000." 147a

Notwithstanding the impropriety of reducing the recommendations of the bankruptcy court solely on the basis

of economy where those recommendations are otherwise supported by the facts, Jacobowitz v. Double Seven Corporation, supra, at 408-09, and notwithstanding the requirement that each case be judged on its own special facts, In re Brooks & Woodington, 505 F. 2d 794, 799 (7th Cir. 1974), the compensation originally recommended by Bankruptcy Judge Galgay was not extraordinary either in absolute dollar amount or percentage of the bankrupt estate. Thus the court was mistaken as to the meaning of "economy" in a case of this sort.

Here we have a $1,000,000 estate where Bankruptcy Judge Galgay found that the existence of the fund is attributable to the efforts of "the Receiver and the Equity Receiver and the applicant [Seligson & Morris]." (108a) [It is evident from the original Certificate that Judge Galgay intended all such comments to apply equally to Weil, Gotshal.] In light of this finding, Judge Galgay's original recommendation was for aggregate compensation of approximately $335,000, or roughly one-third of the estate.

Bankruptcy Judge Asa S. Herzog has suggested that where, as here,

> "the attorney has by his efforts created all or part of the estate, the only realistic course is that he receive

> a reasonable percentage of the recovery. This is the so-called 'salvage theory,' which recognizes that the attorney performs upon a contingent basis and where he is unsuccessful in his efforts, his work would go unpaid. In the end, the inducement must be kept great enough to call out the effort, and to cover the risk of failure." Herzog at 393-94 (footnotes omitted).

Judge Herzog has suggested allowances to the attorneys for the receiver or trustee of 30% of the amount which they have by their efforts added to smaller estates, and of 20% with larger estates. Herzog at 394.

Various courts have agreed with Bankruptcy Judge Herzog's suggestions. Where the attorney for the trustee in bankruptcy instituted litigation which resulted in recovering the only real asset in the estate, this Court, in an opinion by Circuit Judge Learned Hand, approved an award to the attorney of $6,750, or more than 1/3 of the bankrupt estate. Hammer v. Tuffy, 145 F. 2d 447, 450 (2d Cir. 1944). After deducting other costs of administration, only $8,646.99. or less than one-half of the estate, was left for distribution to the non-administration creditors. 145 F. 2d at 450. This Court acknowledged that the award to the attorney "does indeed appear large, at first blush," but pointed out that

> "the recovery was really salvage and involved much labor....All things considered, this is not an unreasonable amount...." 145 F. 2d at 450-51 (emphasis supplied).

Similarly, in Jacobowitz v. Double Seven Corporation, 378 F. 2d 405 (9th Cir. 1967), a $7 500 award to the trustee's attorney was remanded for being unreasonably low despite the fact that total administration expenses were 27.4% of the estate. 378 F. 2d at 407. A distinguished panel of this Court in Silver v. Rosenberg, 139 F. 2d 1020 (2d. Cir. 1944), found an allowance of one-sixth of the total estate to the trustee's attorney, who was responsible for salvaging the estate, to be unreasonably low under the circumstances, and the Court raised the allowed compensation to approximately one-third of the estate. 139 F. 2d at 1020-21. See also, In re Osofsky, 50 F. 2d 925, 927-28 (S.D.N.Y. 1931) (final compensation to attorneys raised to approximately 25% of $4,000 estate); In re Bemporad Carpet Mills, Inc., 434 F. 2d 988 (5th Cir. 1970) (award to trustee's attorney of $50.00 per hour upheld).

Bankruptcy Judge Galgay's original recommendations would have resulted in one third of the estate's being applied to costs of administration. But it cannot be emphasized enough that only $111,000, or one-sixth of the estate,

was for the Equity Receiver, the Chapter XI Receiver, and their general and special counsel -- whom Bankruptcy Judge Galgay found to be responsible for assembling the $1,000,000.* When compared with the principles set forth in the cases cited above, and when considered in light of the court's findings as to the "tremendous" amount of work involved and "extremely high quality" of the services rendered -- these recommendations fall well within the bounds of economy.

IV

REDUCTION IN THE ALLOWANCE OF COMPENSATION WAS ARBITRARY AND UNREASONABLE

In his order of March 3, 1975, District Judge Metzner stated that he rejected the recommendation in Judge Galgay's original Certificate and requested there be a "review [of] the application with a view to ascertaining the duplication of effort, if any, and the scale of fees as of the date the services were rendered, not as of the date of the application." (147a) (Emphasis supplied.)

* Judge Galgay also recommended compensation in the amount of $35,000 to the accountants for the Chapter XI Receiver, without prejudice to their applying for additional compensation if said accountants could establish that additional services were authorized. (113a). However, it is not clear from Judge Galgay's certificate whether he considered the efforts of these accountants influential in the recovery of the estate.

Judge Galgay's Amended Certificate makes no finding adverse to appellant with respect to either of these or any other factors. To begin with, Weil, Gotshal could not have duplicated the services of Seligson & Morris because the shift in firms was tantamount to no more than a change of name. Bankruptcy Judge Galgay so found. (109a. See also 136a - 138a). Next, the record establishes that there was no overlap between Weil, Gotshal and Paul, Weiss. (124a - 125a; 126a - 130a; 132a - 135a). Finally, the record establishes that Weil, Gotshal's application was based on hourly rates charged at the time the services were actually rendered. (130a; 137a - 138a). Thus, Weil, Gotshal qualifies for full allowance under the very standards set up by the court. Still, Weil, Gotshal suffered a reduction of 45% while the award to Seligson & Morris was diminished by only 10%.

The inequity of the compensation granted to appellant is underscored further when compared to the interim compensation allowed the special counsel and general counsel for the trustee. The special counsel for the trustee will receive, on an interim basis, $35 per hour for services

rendered, whereas appellant is to receive $34 per hour as final compensation.*

In sum, the drastic reduction in the compensation is both unjustified and illogical.

V

THIS COURT HAS THE POWER TO FIX COMPENSATION IN THE AMOUNTS SET FORTH IN THE ORIGINAL CERTIFICATE.

This Court and others have increased allowances of compensation when the district court's award was inadequate. Silver v. Rosenberg, 139 F.2d 1020, 1021 (2d Cir. 1944); In re Hudson & Manhattan Railroad Company, 339 F.2d 114, 115 (2d Cir. 1964); In re General Economics Corporation, 360 F.2d 762, 766 (2d Cir. 1966). Cf. Jacobowitz v. Double Seven Corporation, 378 F.2d 405, 409 (9th Cir. 1967) (district court order remanded with directions that allowance to trustee's attorney inadequate). The per curiam opinion in Silver v. Rosenberg is particularly enlightening, since in that case, as here, the amount involved was small:

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* In the five years since the services were performed, there has been an inflation rate of at least 35%. On that basis, the compensation approved by the district court, when received, will have a real value of less than $24 per hour.

> "We have frequently refused to interfere with the award of allowances by a referee after affirmance by the District Court, and in nearly all cases we can properly do nothing else. Nevertheless, our jurisdiction does exist, and its existence presupposes that there may be occasions for its exercise. It seems to us, in spite of the triviality of the sums involved, that this is one of those occasions, and that it is not a sufficient answer that very little will be left [for the creditors] in any event.... In the end the inducement must be kept great enough to call out the effort, and to cover the risk of failure." 139 F.2d at 1021. (Emphasis supplied.)

Accordingly, this Court has the jurisdiction to award appellant the compensation recommended in Judge Galgay's original certificate.

CONCLUSION

Under all relevant criteria, the allowance of compensation recommended in Judge Galgay's original Certificate was manifestly fair and reasonable. Appellant therefore respectfully requests that this Court modify the March 3, 1975 order of District Judge Metzner by approving the

compensation recommended for Weil, Gotshal in Bankruptcy Judge Galgay's original Certificate.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
APPELLANT PRO SE
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New York, New York 10022
(212) 758-7800

Of Counsel:
Harvey R. Miller
Alan B. Miller
William J. Rochelle, III

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

In the Matter of :

JAMES ANTHONY & CO., INC., :

Bankrupt, : Docket No. 75-7232

WEIL, GOTSHAL & MANGES, ESQS., :

Appellant. :

----------x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PATRICIA A. STAVOLA, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18

years of age and resides at 215 Throgs Neck Boulevard, Bronx, New York 10465. That on the 15th day of September, 1975, deponent served two copies of Appellant's Brief and a copy of the Appendix upon the parties listed below:

NEIL, J. MORITT, ESQ.
600 Old Country Road
Garden City, New York 11530
Attorney for Trustee

ALEX L. ROSEN, ESQ.
225 Broadway
New York, New York 10007
Special Counsel for Trustee

JOHN T. COLLINS
Box 1454
West Hampton Beach
New York 11978
Equity & Chapter XI Receiver

HERTZ, HERSON & COMPANY
(Successor to B. Bernard
Greidinger & Co.)
2 Park Avenue
New York, New York
Accountants to Receiver

SOBEL, WEISMANN & CO.
(formerly Sobel, Tuteur,
Weismann, Reiss & Dodis)
401 Hackensack Avenue
Hackensack, New Jersey

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
Gen. Counsel for Equity
Receiver & Special Counsel
for Chapter XI Receiver

SELIGSON & MORRIS, ESQS.
c/o Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022
Special Counsel for
Equity Receiver

IRVING SCHNEIDER, ESQ.
30 Vesey Street
New York, New York 10007
Attorney for Debtor

by depositing same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care

and custody of the United States post office department within the State of New York.

Patricia A. Stanola

Sworn to before me this
15th day of September, 1975.

Prudence Beatty Abram
Notary Public

PRUDENCE BEATTY ABRAM
Notary Public, State of New York
No. 31-5005960
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that
deponent is the in the within action: that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s)
for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....

Sir true c duly name Datea Attor Boro To Attor

Sir of w for se one on th at Datea Attor Boro To Attor

NOTICE OF ENTRY

Sir :—Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address
767 FIFTH AVENUE
Borough of Manhattan New York, N.Y. 10022

To

Attorney for

NOTICE OF SETTLEMENT

Sir :—Please take notice that

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

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767 FIFTH AVENUE
Borough of Manhattan New York, N.Y. 10022

To

Attorney for

Index No. 75-7232 *Year* 19

UNITED STATES COURT OF APP
FOR THE SECOND CIRCUIT

In the Matter of

JAMES ANTHONY & CO., INC

Bankrup

WEIL, GOTSHAL & MANGES, E

Appella

AFFIDAVIT OF SERVICE BY M

WEIL, GOTSHAL & MANGE

Attorneys for Appellant

Office and Post Office Address, Telephone
767 FIFTH AVENUE
Borough of Manhattan New York, Y.
(212) PLAZA 8-7800

To

Attorney for

Service of a certified copy of the within
is hereby
Dated,

Attorney for

EALS

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SQS.,

nt.

AIL

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10022

admitted.